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No. 311

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, APPELLANT

v.

COLGATE-PALMOLIVE-PEET COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

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CITATIONS

Case:

United States of America, Appellant v. *Durkee Famous Foods, Inc.*, No. 309, October Term, 1938 ..... 2, 8

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OPINION BELOW

The opinion of the District Court (R. 15–17) has not been reported.

JURISDICTION

The order of the District Court sustaining the plea in bar and dismissing, discharging, and quashing the indictment was entered June 28, 1938 (R. 17). The appeal to this Court was applied for and allowed on July 25, 1938 (R. 20). The jurisdiction of this Court is conferred by the Criminal

Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682) and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 345). An order was entered by this Court on October 10, 1938, noting probable jurisdiction.

QUESTIONS PRESENTED

1. Whether Section 1 of the Act of May 10, 1934, which limits the operation of statutes of limitations and authorizes a new indictment where a prior indictment has been found defective or insufficient for any cause after the period of limitation provided by the applicable statute has expired, permits the new indictment to be returned at the same term of court during which the prior indictment is found defective.

2. Whether the application of the Act, in authorizing new indictments in the specified cases whenever prior indictments are found defective or insufficient "for any cause," is conditioned upon or affected by the nature of the ground upon which the prior indictment is quashed.

STATUTES INVOLVED

The statutes involved are printed in the Appendix to the Government's brief in *United States of America, Appellant* v. *Durkee Famous Foods, Inc.*, No. 309, October Term, 1938, wherein the identical questions here involved are discussed.

STATEMENT

On April 9, 1937, the grand jury empaneled for and in session during the January, 1937, term of the United States District Court for the District of New Jersey indicted the appellee in five counts charging violations of the Elkins Act (U. S. C., Title 49, Sec. 41 (1)). Each count of the indictment (R. 1) alleges that under the following circumstances the appellee unlawfully and knowingly solicited, accepted and received in July, September or October, 1932, a concession of 2 cents per 100 pounds in respect of the interstate transportation by certain railroad common carriers of a shipment of palm oil, whereby the oil was transported by the railroads at a less rate and charge than that named in their published schedules and tariffs.

The railroads published in their tariffs a line-haul rate of 40 cents per 100 pounds for the transportation of vegetable oils, including palm oil, from alongside steamships or vessels within the free lighterage or floatage limits of New York Harbor, N. Y., to Jeffersonville, Indiana. Their tariffs provided, in connection with the acceptance and handling of shipments to be transported at that rate, that property loaded in tank cars would receive free floatage within the Harbor when loaded in lots of six or more tank cars, or in less than six cars if the total weight of the entire shipment was 240,000 pounds or more. The tariffs also provided that shipments of palm oil in lots of 240,000 pounds

or more would be handled across the Harbor in tank barges in lieu of tank cars on floats when the barges were ordered by the shipper or consignee, "in writing," and were available, and that when tank barges were so used, the service of pumping and transferring the oil from the barges to tank cars would be at the expense of the shipper, for which service a charge of 2 cents per 100 pounds, would be made against the shipper in addition to the 40-cent line-haul rate (R. 1–2).

Appellee ordered, "in writing," from the railroad named in each count of the indictment, tank barges, in lieu of tank cars on floats, for the transfer of the specified shipments of imported palm oil from alongside steamships or vessels anchored in New York Harbor [and within the free lighterage and floatage limits of the Harbor] to the terminal of the railroad in New Jersey, and tendered the shipments to the railroad for transportation from the steamship to Jeffersonville, Indiana. The railroad accepted the shipments and, through its agent, Manhattan Lighterage Company [Count 1] or New York Tank Barge Co., Inc. [Counts 2, 3, 4, and 5] conveyed the shipments by tank barge from the steamship to the railroad terminal in New Jersey, where the agent pumped or transferred the oil from the barges to tank cars, and whence the railroads transported the shipments to Jeffersonville, Indiana. Appellee paid to the railroads *only* the line-haul rate of 40 cents per hundred pounds. The agent paid the railroad the 2-cent pumping

charge. Pursuant to a previous secret arrangement between the agent and the appellee, the appellee never paid any part of the tariff charge for the pumping service to the railroads or to the agent and, by that device, obtained the alleged concession of 2 cents per 100 pounds from the published tariff rate (R. 3).

A prior indictment based upon these facts and charging the same offenses had been returned at the April term of court in 1934 (R. 22). A motion to quash (R. 33) that indictment was sustained by opinion filed January 14, 1937 (R. 34) and judgment entered March 15, 1937 (R. 12), during the January 1937 term of court.[1] That indictment was quashed on the ground that it failed to allege the fact that appellee's request upon the railroad for tank barges was made "in writing" as required by the tariff rule, which had been laid before the court by stipulation (R. 34–35).

At the same term of court the Government, invoking the Act of May 10, 1934, re-presented the case to the grand jury empaneled for and in session during the January term, 1937, at Trenton, and that grand jury returned the new indictment on April 9, 1937, the January 1937 term having been extended by order of the court (R. 18). The new

[1] Thus, almost three years had passed between the return of the indictment and the date on which it was quashed. Meantime, the offenses having been committed in July, September, and October, 1932, the statutory period of limitation had expired and reindictment was barred but for the Act of May 10, 1934.

indictment in five counts contains the allegation that appellee's order for tank barges was made "in writing," thus curing the defect which the court found in the prior indictment.

To this new indictment of April 9, 1937, the appellee filed on June 18, 1937, a pleading designated as a "Plea in Bar," alleging (1) that as the offenses charged were committeed more than three years preceding the return of the indictment, prosecution was barred by the statute of limitations (U. S. C., Title 18, Sec. 582); (2) that the indictment was not returned in conformity with the Act of May 10, 1934, because it was returned at the same term and not at the term next succeeding the term at which the prior indictment was found defective; and (3) that the order quashing the prior indictment was appealable under the Criminal Appeals Act and that, therefore, the Act of May 10, 1934, had no application to that order (R. 11-13).

On June 28, 1938, the court entered judgment (R. 17) ordering—

> that the said Plea in Bar to said indictment herein be and the same is hereby sustained, and that said indictment be not further prosecuted against said defendant, and that said indictment be and the same is hereby accordingly dismissed, discharged, held for nought and quashed.

Construing the Act of May 10, 1934, the court's opinion (R. 17) held that the language of the Act—

leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In sustaining the plea in bar.

2. In holding and adjudging that the statute of limitations had barred the prosecution of the offenses alleged in the several counts of the indictment.

3. In holding and adjudging that the Act of May 10, 1934 (U. S. C., Title 18, Sec. 587), did not limit the application of the statute of limitations (U. S. C., Title 18, Sec. 582) so as to permit the new indictment to be returned by the grand jury empaneled at and in session during the same term of court at which the prior indictment was found defective and insufficient.

4. In holding and adjudging that the Act of May 10, 1934 (U. S. C., Title 18, Sec. 587), was effective to stay the statute of limitations only where the new indictment is returned by a grand jury in session

during the next succeeding term of court following the term at which the prior indictment was found defective or insufficient.

5. In entering the order of June 28, 1938, sustaining the plea in bar and dismissing and quashing the indictment.

DISCUSSION

As this case presents the identical questions which are involved in the case of *United States of America, Appellant* v. *Durkee Famous Foods*, No. 309, October Term, 1938, the Court is respectfully referred to the Government's brief in the *Durkee* case for a discussion of the Government's contentions.

CONCLUSION

For the reasons stated in the Government's brief in the *Durkee* case, it is respectfully submitted that the judgment of the court below sustaining the plea in bar to the indictment in this case should be reversed.

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DECEMBER 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938